THE SCHOOLS OF JURISPRUDENCE

THEIR PLACES IN HISTORY AND THEIR PRESENT ALIGNMENT

THE QUARRELS OF THE "SCHOOLS"

THE several schools of jurisprudence — philosophical, analytical, historical, comparative, sociological — do not represent different avenues of approach to a common goal, but rather different goals. It is not merely a case of three blind men disagreeing in their descriptions of an elephant to which they have been led, there is rather a genuine difference of opinion as to which of the animals is the elephant. The first and most enduring difference among the schools pertains to what law is. Then, naturally, they differ as to what jurisprudence is. Is it a science, a philosophy, a general attitude, a system, a theory, or a method?[1] The current names of the schools do not always make the issues among them clear. There is nothing in the study of history or philosophy that excludes analysis or a consideration of the social ends or other ends that the law serves or should serve. One writer, indeed, feels that he has "reconciled" all the differences of the historical and analytical schools by combining between the covers of one book a sketch of legal history with an analysis of law.[2] And others either confound historical jurisprudence with legal history[3] or deliberately use the "imposing quadrisyllable" instead of "law"

[1] Perhaps a great deal of confusion could be avoided by avoiding the word "jurisprudence" and coining such expressions as Prof. John Henry Wigmore's Nomoscopy, Nomosophy, Nomodidactics, and Nomopractics to cover the branches of Nomology. (See JOURNAL OF PHILOSOPHY, PSYCHOLOGY, AND SCIENTIFIC METHODS, vol. XI, 348, 1914.) The Germans are substituting *Rechtswissenschaft* and *Rechtsphilosophie* where *Jurisprudenz* was used a generation ago. But the important question is not as to the "right meaning" of a word, nor as to the "proper" method of the studying of law. It concerns the general nature of law, disagreements as to which will be reflected in our definitions, in our methodology, in our selection of sources, in our emphasis of conscious and unconscious processes in its genesis, in our general attitude toward the law. I am accordingly using the word "jurisprudence" as it is generally understood in the phrase "schools of jurisprudence" as synonymous with "general theory of law."

[2] HANNIS TAYLOR, THE SCIENCE OF JURISPRUDENCE, 1908.

[3] *E. g.*, GUY CARLETON LEE, HISTORICAL JURISPRUDENCE, 1900.

in spite of Professor Holland's warning.[4] Sir Frederick Pollock, the Dean of Anglo-American writers on Jurisprudence, to whom we shall have many occasions to refer, long ago discussed "The Methods of Jurisprudence" — the practical, historical, comparative, and analytical study of existing law and the practical and speculative treatment of law as it ought to be — lamenting the fact that these methods were generally considered positively hostile to each other instead of mutually helpful.[5] An American teacher[6] has proposed a college of jurisprudence that will teach *inter alia:*

1. Historical, or *genetic*, jurisprudence.
2. Comparative, or *eclectic*, jurisprudence.
3. Formal, or *analytical*, jurisprudence.
4. Critical, or *teleological*, jurisprudence.
5. Legislative, or *constructive*, jurisprudence.
6. Dynamic, or *functional*, jurisprudence.

A man in a restaurant once ordered cherry pie, mince pie, peach pie, and lemon pie. The waiter quietly asked, "What's the matter with the apple pie?" What is the matter with philosophical jurisprudence, sociological jurisprudence, ethnological jurisprudence, and so forth? But, seriously, if all that is intended by these formidable expressions is the history of laws, a comparison of legal provisions or systems, an analysis of law, and so on, it is possible, though by no means probable, that one jurist, one school, or one age will find it satisfactory or profitable to approach law over and over again from each of these angles — provided always that one can satisfy himself as to what law is without completely surrendering to one of the "schools" at the outset. If anyone is inclined to try this experiment, lest he take all these varieties of jurisprudence to connote the teachings of the schools that bear their names,[7] I commend to his attention a passage that Jhering pre-

[4] THOMAS ERSKINE HOLLAND, ELEMENTS OF JURISPRUDENCE, 1880, 12 ed., 1917.

[5] SIR FREDERICK POLLOCK, THE METHODS OF JURISPRUDENCE (delivered 1882) in OXFORD LECTURES AND OTHER DISCOURSES, [1890] 24.

[6] WESLEY NEWCOMB HOHFELD, A VITAL SCHOOL OF JURISPRUDENCE AND LAW, in ASS'N AM. LAW SCHOOLS. PROC., [1914] 76, at page 83.

[7] Needless to say the severe logician who wrote "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 YALE L. JOUR. 16, 26 *ib.* 710, avoids the pitfall of confounding "these departments of general jurisprudence" with the teachings of the schools that bear the names he has adopted.

tends to quote, half in jest and half in earnest.[8] He speaks of three kinds of minds: those that can see only one side of a matter; those that can see all sides, but only one at a time and are therefore untroubled by inconsistencies; and finally, those that can see the several sides at once, detect the inconsistencies, and be troubled by a doubt. I should pity any of these minds in a College of All Jurisprudences, but the last class in particular would suffer martyrdom. For the "schools" are inconsistent with each other, sometimes consciously, sometimes unconsciously. They are the products of different times and places, and differ not only in their points of view, methods, and tendencies, but in their fundamental concepts, their problems and purposes — in a word, in the subject matter of their studies.

Changes in Jurisprudence Conditioned by Changes in Law

Indeed, how can theories of law escape change, so long as the law itself is changing? The idea of a jurisprudence fit for the law of a given time and place is, of course, not new. Austin's severest critics admit that his conception of law is unimpeachable so far as the English Law of his time is concerned. Their attacks are based on the fact that it will not comfortably fit the law of all times and places.[9] Professor Pound goes further and suggests in several connections that certain of the schools of jurisprudence are apt to make their appearance in legal periods of one type or another.[10] Sir Frederick Pollock in an essay already cited [11] asks

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[8] Rudolph von Jhering, Scherz und Ernst in der Jurisprudenz, 1885 (9 ed., 1904), 29.

[9] Sir Henry Sumner Maine, Early History of Institutions, 1875 (7 ed., 1897), 380; Village Communities in the East and West, 1871 (7 ed., 1895), 67; *cf.* Edwin Charles Clark, Practical Jurisprudence, 1883, 5, 135; Edward Jenks, Law and Politics in the Middle Ages, 1897, 2. See also remark *ib.* 3, on the changing conception of law.

[10] Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 Harv. L. Rev. 594; 25 *ib.* 147: "It is noteworthy that the breakdown of philosophical jurisprudence in both countries coincides with the rise of a body of enacted law in which many traditional rules and doctrines were rejected summarily or made over from end to end. A tendency to dry-rot in juristic theory in periods of enactment and codification is to be observed throughout legal history." *Cf.* also 18 Yale L. Jour. 462; 8 Columbia L. Rev. 612.

[11] See note 5.

why one or another of the methods of jurisprudence has in different times and nations had the supremacy. His answer, paradoxically enough, is rendered less useful for our present purpose than might have been expected by his tendency here as elsewhere [12] to look beneath the surface for the great underlying similarities. After discussing the historical conditions, mere accidents, that seem to sever the schools, he concludes: "There is no reason why in England, Germany, or America we should make ourselves the slaves of such conditions, or why one method should be cultivated to the exclusion of others. The false pride and exclusiveness of a favorite method will always bring their own punishment." It is painful to take issue with a teacher to whom one owes so much, but I cannot resist the conclusion which I expressed elsewhere in another connection [13] that each age is *entitled* to its own theories and classifications of law, and that it cannot resist the necessity of making them even when it renders a lip homage to the past by keeping the old terms to express new meanings.

At any rate, whether meriting blame or defense, the general tendency has been to do exactly what Sir Frederick Pollock condemns, to cultivate one method at a time to the exclusion of others. Even those writers who introduce their treatises with discussions of the work of the earlier schools, almost always proceed on the theory that each of the schools has been in possession of part of the truth the whole of which is to be presented in the treatise in hand. In the last few years, however, great progress has been made in laying the world's legal philosophies before us, side by side.[14] This work furnishes a strong temptation to marshal

[12] *Cf.* HISTORY OF THE SCIENCE OF POLITICS, 1890 (ed. 1908), 112–17.

[13] 23 JOURN. POL. SCI. 530.

[14] Especially in THE MODERN LEGAL PHILOSOPHY SERIES, edited by a Committee of the Association of American Law Schools; THE CONTINENTAL LEGAL HISTORY SERIES, published under the auspices of the same association; THE MODERN CRIMINAL SCIENCE SERIES, published under the auspices of the American Institute of Criminal Law and Criminology; and the EVOLUTION OF THE LAW SERIES, compiled by Albert Kocourek and John Henry Wigmore. (What a monument are all of these series together with SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY to the diligence and initiative of Dean Wigmore!) Of the first series I have made freest use of FRITZ BEROLZHEIMER, THE WORLD'S LEGAL PHILOSOPHIES, translated in 1912, from vol. II of his SYSTEM DER RECHTS- UND WIRTSCHAFTSPHILOSOPHIE (1904–07). Of the second series, No. 2, on THE GREAT JURISTS OF THE WORLD, has been quite useful, though an older, less systematic work, covers much of the same ground, and viewed as a storehouse of information, is far more extensive: DENIS CAULFEILD HERON,

the schools, or at least to discern in their appearance, growth, and disappearance from time to time, and in their reappearances, a reflection of the normal stages of legal development. In predicating a normal course of the development of communities, and in suggesting further that the stages in this course tend to reappear from time to time, I am not arguing for a fatalistic philosophy of history such as Vico unfolded: his cycles deal with a sequence of accomplishments which are in reality subject to accidents; I am speaking only of thought tendencies. Still there is no necessity of adopting the theory of spontaneous generation of ideas in a predestined order such as McLennan, Morgan, Post, and Friedrichs imposed on the helpless savages of all climes. The thought tendencies that I believe are discernible in the legal histories of all the peoples with which we are acquainted form a sequence that Tarde himself would admit of, as tendencies due to the workings of what he calls logic.[15] In fact, in the present attempt to marshal the schools of jurisprudence, we shall avoid so far as possible a consideration of the changing content of the law, and confine our attention to the successive changes in its outward form and in the consequent manner of approaching and handling it.

How Law Changes — The Cycle Theory

The notion of a normal course of legal development has exercised an easily explained fascination on many types of minds. Different as are the generalizations of Vico, Hegel, Maine, Fustel de Coulanges, and Pound, to mention only one name in each country, they all agree that the law itself is subject to a law of development. I have attempted elsewhere [16] to trace the successive steps in the progress of the law of a people in outlines suggested by all of these, but particularly by Sir Henry Maine. Beginning in an attempt to

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Introduction to the History of Jurisprudence, 1860. Works on the history of political theories are also helpful, especially William Archibald Dunning, Political Theories (Ancient and Mediaeval, 1902; From Luther to Montesquieu, 1905). The indebtedness of anyone working in this field to the essays of Professor Pound in the Harv. L. Rev. (XXIV, 591; XXV, 140, 489; XXVII, 195, 605; XXX, 201) is too obvious to require further mention. He gives a bibliography of the schools of jurisprudence in note 1, 24 Harv. L. Rev. 591.

[15] Gabriel Tarde, Les Transformations du Droit, 1893 (7 ed., 1912), 185; 2 Evolution of Law Ser. 49.

[16] "The Law and the Law of Change," 65 U. of Pa. L. Rev. 665.

explain the reason behind his remarkable observation that Legal Fictions, Equity, and Legislation follow each other universally in the order named, I was led to the consideration that each of these instrumentalities, by which the law is kept in harmony with society, is connected with a peculiar point of view resulting from the state of the law at a given time.

To illustrate the successive states of the law it is necessary only to look into the history of any people that has once achieved codification. The first task of its lawyers is word-study or glossation. New cases, hard cases, can be met only by intensive word-study, perhaps by word-stretching or Legal Fictions. The letter remains though the spirit has outgrown it. In the history of Roman-Continental Law not only the Twelve Tables, but the Code of Justinian and its modern successors in the various continental countries, "Las Siete Partidas," "Code Napoléon," and "Bürgerliches Gesetzbuch," each produced its code-bound glossators. Other illustrations abound in the histories of other legal systems.[17] In Anglo-American Law the closing of the Register of Writs, at the end of the thirteenth century just before the days of the Year Books, is for all practical purposes analogous to codification.[18]

When a reaction finally sets in against this artificial over-emphasis of the tittles and jots of the law, it matters little how it is brought about, the net result is the emphasis of principle-study as compared with word-study. Commentators supersede the glossators in the schools, and in the courts salvation is sought in the magisterial administration of general principles — that is, Equity. The general principles administered may be very vague appeals to a "word of God" or "conscience" or a "Law of Nature," or they may be more definite principles derived from the extension of the known rules of the law to similar cases. For illustrations we may turn to the several periods following the glossation periods already mentioned: for example, the periods of Natural Law in the Rome of the Praetors and in the seventeenth and eighteenth centuries in Continental Europe, and the Equity period of Anglo-American Law, especially the seventeenth and early eighteenth centuries.

[17] "The Law and the Law of Change," 65 U. of PA. L. REV. 674–79, 748–63.

[18] *Ib.* 671, more fully developed in my paper on "The Standardizing of Contracts," YALE LAW JOUR., November, 1917.

Finally, the principles of a given time become exhausted. In spite of the court's efforts to bend and twist them into new shapes, their inflexibility gradually becomes apparent. The needs of the time finally force men into the conscious modification of their received law, and Maine's third instrumentality, Legislation, appears. *Parva metu primo*, it takes on strength and courage with every stride, until it stalks about as it did in Imperial Rome, in France at the end of the eighteenth century, in Germany in the nineteenth century, and in England and America, still.

Here Maine would end the tale, but history goes right on. Legislation finally is swallowed up in a new codification, and the cycle is ready for another turn. We have then in a developed system of law, that is, one in which codification has once made its appearance:

Codification
  Glossation (word-study and Legal Fictions)
  Commentation (principle-study and Equity)
  Legislation (conscious modification)
Codification

The Cycles of Jurisprudence

With each of these stages, within every cycle, we can associate not only a certain degree of crystallization and a different instrumentality for the improvement of the law, but also a different appearance of the subject matter of jurisprudence, and a different method of study appropriate to the needs of the time. Now if we divide jurists into two general classes on the basis of their predilection for the law as it is, or the law as it ought to be, calling them, as Bentham [19] does, "Expository" and "Censorial," [20] we can construct a diagram which seems to marshal the schools in the order in which they have actually made their appearance and reappearance from time to time. Of course, one must not expect to find the periods sharply divided. Not only will there be overlappings and occasional conscious imitations of the jurisprudence of another period, or another country, but, in general, the jurisprudence that belongs logically with a given state of the

[19] Works of Jeremy Bentham, ed. Bowring, I, 148. See Holland, *op. cit.* 5.

[20] Perhaps the Germans would call their works Begriffsjurisprudenz and Zweckjurisprudenz, respectively.

law will be seen rather to follow its crest and lag behind after its decline than to appear along with it. This is but natural when we consider that jurisprudence is generally learned from observation of the law, and based on the accomplished fact, rather than *vice versa*. Allowing to each typical stage of legal development its two classes of jurists, we have six groups into which the several schools may roughly, but I hope without too great violence, be cast.

TABLE OF THE STAGES OF LAW AND OF JURISPRUDENCE

Type of period	Expository Jurisprudences	Censorial Jurisprudences
Glossation	Exegetical (studying the text)	Comparative - Apologetic (criticizing by reference to foreign systems)
Commentation	Analytical (studying principles)	Philosophical (recognizing Law of Nature as *the* Law)
Legislation and Codification	Historical (conscious of change)	Constructive (using the power to change)

There is no magic in the formula. On the contrary, it may possibly be reduced to mere truisms, for it is difficult to see how any different results could be expected from turning scientists and reformers loose upon the law at any given stage.

(*a*) *Constructive Schools*

Believing in the desirability of reading history backwards, let me first take a law reformer and set him down in a time such as we are passing through in Anglo-American Law — when law reform is by means of easily achieved legislation, when it is a general postulate of all men that we can make and unmake laws to suit ourselves. He is bound to become a constructive jurist. He may, and probably will, be more concerned about the particular ideas that he wishes to embody in his legislation than in the instrumentality on which he relies. He may call himself a sociological jurist or may embroider the "Rights of Man" on his banner, he may make "the greatest good of the greatest number" his

battle-cry, or "Kultur" his *Schlagwort*, but his conception of law will be shot through with the theory of legislation.[21] Thus he will hardly be frightened by the notion that laws are born and not made, on the one hand, nor will he lapse into theories to the effect that certain rules are law whether men declare them or not. He will be neither an historical nor a philosophical jurist — historian and philosopher though he may be. He will not look up to the words of the law as authorities, nor consider its principles final. His exegesis is strict or free — whichever happens to offer the greatest assistance for the moment in his constructive work.[22] He may, indeed, have his principles of interpretation, yet the height of legal wisdom for him will certainly not reside in hermeneutics; in fact, he is likely to take pride in his freedom from Mechanical Jurisprudence.[23] And as far as analysis is concerned, what is there to analyze while law is in a state of flux? He knows that the legislature can render the nicest scheme obsolete at a single session. Still, whatever details the problems of his day may bring to the front, no matter how they may color his definition of law, he can hardly escape the necessity of defining it as positive law.

This kind of jurisprudence we can trace in each of the European systems of law on the eve of codification. The Corpus Juris of Justinian, though quoting disagreeing writers indiscriminately, seems to take its jurisprudence from men of the type of Ulpian. His picture of the Roman lawyer of the classical period is that of a man "skilled and competent to advise in the laws of Rome; not the laws of Plato's Republic on the one hand, nor the particular ordinances of Rhodes or Ephesus on the other." [24] In the language of our day he is neither a philosophical nor a comparative jurist, but an expounder of positive law. The opening sentences of the Institutes (those imitated in Glanvil, Bratton, the "Fleta," the

[21] In this study I am not concerned with the particular rules of law advocated, a subject matter more closely allied with practical politics than with jurisprudence. My topic is limited to varying attitudes towards law — the means, and not the end.

[22] The advocate of conscious development of the law is just as apt to criticize the court's construction of a statute by reference to a "rule of reason" as he is to oppose a strict construction that refuses to go one jot beyond the actual words used by the legislature.

[23] *Cf.* Roscoe Pound, "Mechanical Jurisprudence," 8 COL. L. REV. 605 (1908).

[24] SIR FREDERICK POLLOCK, OXFORD LECTURES (1890), 20.

"Regiam Majestatem" and Fortescue) make laws, like arms, instruments of the sovereign in the work of government. Laws are imposed by the sovereign. In modern times we find the constructive or legislative theory first among French, then among German, and finally among Anglo-American jurists. In France the way was blazed by the French Revolution, whose hot-heads and philosophers felt their creative power so keenly that they set about the making of a new reckoning of time, a new system of government, a new set of laws — positive laws. The spirit of Rousseau's *volonté générale* rode on top of the wave.[25] It was not the arms of Napoleon, but his Code, that set this attitude toward law at rest. In Germany, codification was delayed, but when the "Bürgerliches Gezetzbuch" was going through the crucible (1874–96) the spirit of the times was likewise a recognition of the power of man to make his law. Law, according to Jhering (1818–92), was not merely the outcome of unconscious forces, but the result of the efforts of individuals.[26] "*Die höhere Jurisprudenz*," says he, "*ist nicht bloss Bildnerin des Stoffs sondern auch Schöpferin.*" [27] To him the process of law-making seemed an increasingly conscious process. That the tide of legislation would ever ebb and the subconscious processes become important again, did not occur to him, any more than it does to those in our midst who rejoice that the law is at last like clay in the potter's hands. In the Anglo-American system the constructive period not only has its theorists near the end, but a prophet at the beginning. Jeremy Bentham (1748–1832) is now claimed by many schools — but his capital discovery has paradoxically, yet fairly, been summarized as the duty of legislation.[28] Though he has points of contact with other schools, he is the jurist of the legislative era that ensues after his death. Coming down to the end of the period and crossing the Atlantic, we have the names of John Henry Wigmore (b. 1863)

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[25] JEAN JACQUES ROUSSEAU (1712–78), DISCOURS SUR L'ORIGINE DE L'INÉGALITÉ PARMI LES HOMMES, 1752 (destructive) and DU CONTRAT SOCIAL, OU PRINCIPE DU DROIT POLITIQUE, 1762 (constructive, distilling the *volonté générale* out of the Social-Contract theory).

[26] Preface to JAHRBÜCHER, cited in GREAT JURISTS, 598. Man's conscious effort in another form is the theme of his KAMPF UMS RECHT, 1872.

[27] Quoted in GREAT JURISTS, 596.

[28] SIR FREDERICK POLLOCK, HISTORY OF THE SCIENCE OF POLITICS, 1890 (ed. 1908), 100.

and Roscoe Pound (b. 1870) to represent us in this school. These words written recently of Jhering[29] could be applied as readily to any of our own constructive jurists: "He is constantly protesting against the excessive importance given to mere logical expressions of law and the absurdity of treating jurisprudence as if it were a sort of legal mathematics. He had a craving for actuality; he could not abide phantasies severed from facts."

(*b*) *Historical Schools*

Not all — not even most — jurists have their faces turned towards the future. Law as it is, is also a proper and fertile field for their cultivation. Set the reflective mind to work upon the law in a period of conscious change: whatever its attitude towards particular changes, it cannot regard the law as a fixed thing. On one side are those on whom the plasticity of law dawns as a new discovery — the nascent constructive school. They would codify what they approve and remake whatever they disapprove. They would break with the past. Some of them would not hesitate to draw up constitutions for commonwealths which they have never seen. Their excesses call forth reactions. Thibaut is checked by Savigny in Germany; Bentham in England and David Dudley Field in America find their contemporaries of the historical schools tough-minded. The most conspicuous representatives of the historical schools have thus become identified with reactionary doctrines, and they have accordingly been criticized for their lack of prospective vision.[30] The typical constructive jurist who comes after legislation has proved its power, has a large and hopeful program; the historical jurist, on the other hand, coming a little earlier is apt not only to lack such a program, but to extend his enlightened scepticism to the future as well as to the past, and to question the ultimate power of legislation to do more than what history is ready for. This is the fatalism that many have found

[29] By SIR JOHN MACDONNELL, in GREAT JURISTS, 599.

[30] "The Anglo-American historical school (founded by Maine) has not a single reform or constructive piece of legislation of any magnitude to its credit. Indeed, the historical school has been a positive hindrance to any improvement or enlargement of the law, — precisely because those who think of new problems exclusively in terms of historical analogies get tangled up in their own traces and think that what has been must remain forever." Morris R. Cohen, "History *versus* Value," JOURN. PHIL., PSY. AND SCI. METHODS, vol. XI, 701, 706.

in this school. Yet not all of the historical jurists have been reactionary. Maine in England, and Savigny in Germany, recognized the value of legislation in its place. Maitland, the master of legal history (not strictly an historical jurist), began and ended his career as a law-writer by advocating the sweeping away of the cobwebs in real property law,[31] and like our own Mr. Justice Holmes used his vast learning quite as frequently to point out the folly of conservatism as its wisdom.[32] No one could more gracefully represent the transition from the historical phase to the constructive phase of a generation that views law as a changing phenomenon, than does Judge Holmes. "For the rational study of the law," said he twenty years ago, "the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Again, "I look forward to the time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." [33] But whether looking only to the past, or willing to see the future continue to develop the law as the past has done, the historical jurist recognizes many limitations on the powers of conscious change. His favorite analogy is the analogy of language. Since Savigny's day attempts have, indeed, been made to create new languages — but most of the world is not yet speaking Ro or Esperanto, nor are we likely to substitute an artificial universal law for the national laws that have grown up among us.

Historical jurists, just because their subject matter is hemmed in by local and national facts, will not be of one accord in their definitions — but it is natural to expect them to pick flaws in the definition which emphasizes the "command," the unhistoric command. Neither will they uncritically accept the Law of Nature or the Law of Reason. "The law," says the historical jurist,[34] "embodies the story of a nation's development through many

[31] THE LAW OF REAL PROPERTY, 1879, in COLLECTED PAPERS, 1911, vol. I, 162. In 1906, the year of his death, he lamented the timid and half-hearted acts relative to land transfer with which Parliament was muddling along. *Ib.* vol. III, 488.

[32] *Cf.* "A Plea for the Codification of English Law," IX, in NEW CENTURY REVIEW, vol. XI, 52, 1897.

[33] "The Path of the Law," 10 HARV. L. REV. 469, 474.

[34] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881), 1.

centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

The Historical School was one of the prevailing schools in Anglo-American jurisprudence during the nineteenth century. With its weapons James Coolidge Carter (1827–1905) successfully fought off codification, and became the Savigny of America.[35] For England we have already mentioned Sir Henry Maine. Though his outlook was too broad to permit him to remain within the confines of one school — he outdid the comparative jurists of France in their own specialty — his phrases have become the common property of the Anglo-American historical jurists: "from status to contract," "Legal Fictions, Equity and Legislation," the precipitation of substantive law in the interstices between the meshes of adjective law, and so forth.[36] As a result of Maine's teaching, the advocates as well as the critics of modern legislation have been conscious of living in an era of legislation, which simply tops off other eras of legal history — and the lawyers, at least, have minimized the importance of statutory law as a result, frequently to the astonishment and disgust of the layman.

In Germany the Historical School came and went about fifty years earlier than it did in England. Its greatest name is that of Friedrich Carl von Savigny (1779–1861).[37] He was not the founder of the school; Gustav Hugo (1764–1844)[38] had preceded him. Nor were his works so finished as were those of his own disciples,[39]

[35] His writings include: PROPOSED CODIFICATION OF OUR COMMON LAW, AM. BAR ASS'N, REPORT, 1884 (answered in DAVID DUDLEY FIELD, SHORT RESPONSE TO A LONG DISCOURSE); PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW, an address to the Virginia Bar Association, 1889; THE IDEAL AND THE ACTUAL IN LAW, 24 AM. LAW REV. 752, and AM. BAR ASS'N, REPORT, 1890; LAW, ITS ORIGIN, GROWTH, AND FUNCTION, 1907.

[36] SIR FREDERICK POLLOCK, Introduction to SIR HENRY MAINE'S ANCIENT LAW, 1906; ROSCOE POUND, 30 HARV. L. REV. 209 *ff.*, 1917.

[37] VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT, 1814 (ed. 1892); GESCHICHTE DES RÖMISCHEN RECHTS IM MITTELALTER, 1815–51; SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, 1840–49.

[38] LEHRBUCH EINES ZIVILISTISCHEN KURSUS, 1792–1821; ZIVILISTISCHES MAGAZIN, 1790–1837. Foreshadowings of the school may be traced back to Christian Gottlieb Haubold (1766–1824), Jean Etienne Putter (1725–1807), and even to Leibnitz (1646–1716).

[39] Especially G. F. PUCHTA (1788–1846), DAS GEWOHNHEITSRECHT, 1828; FRIEDRICH HARMS (1819–80), BEGRIFF, FORMEN, UND GRUNDLEGUNG DER RECHTSPHILOSOPHIE; EDUARD GANS (1797–1839), DAS ERBRECHT IN WELTGESCHICHTLICHER ENTWICKELUNG (1824–35); VERMISCHTE SCHRIFTEN, 1834.

but his influence was tremendous. He saved jurisprudence from the clutches of the so-called Natural Law with its "infinite arrogance" and its "shallow philosophy." The philosophy of the day was preparing the way for Savigny's jurisprudence. In particular, Hegel (1770–1831) developed a philosophy exactly suited to the needs of the Historical Schools.[40] Clearly Savigny reflected the "Beruf" of his time correctly. To spring from the dogmatic Law of Nature of Christian Wolff into Codification merely because France had made a code, though a great temptation, would have been futile. Savigny was a young man in 1794 when the obscurantist mystic, Frederick William II, gave Prussia its *Landrecht.* He was soon able to compare the final product with the original project of Frederick the Great and Samuel von Cocceji (1679–1755).[41]

France, indeed, had been prepared for Codification not only by an eventful political history during the preceding generation, and a long-standing national unity and self-consciousness (its eighteenth-century jurists wrote in French, Germany's were still using Latin), but by a much earlier disappearance of the school of the Law of Nature. Montesquieu (1689–1755) has frequently been described as the founder or forerunner of the Historical School. The suggestion is usually accompanied by the observation, on the one hand, that his historical method was faulty, and on the other that the study of history as an aid to law was much older than Montesquieu. Were not Alciati and Cujas historical students of law, and did not their spirit transcend even the Natural Law period in France? We must distinguish here, however, between the study of legal history and the peculiar attitude towards law that typifies the so-called Historical School of Jurisprudence. In this school there is first of all a realization of the importance of what we should call today the subconscious processes that contribute to the growth of law, and the consequent relativity of law. There is a revolt from those older schools that postulate a perfect law independent of mankind. We can almost identify

[40] GRUNDLINIEN DER PHILOSOPHIE DES RECHTS, ODER NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE, 1821.

[41] SAMUEL VON COCCEJI, SYSTEMA NOVUM JUSTITIAE NATURALIS, SIVE JURA DEI IN HOMINES, ET HOMINUM INTER SE, 1748; ELEMENTA JURISPRUDENTIAE NATURALIS ET ROMANAE, 1740. Cocceji is said to have drafted the LANDRECHT for Frederick the Great.

the spot where Montesquieu steps out of one and into the other. In the eighty-first of the "Persian Letters" (1721) he says, "I have often set myself to think which of all the different forms of government is the most conformable to reason, and it seems to me that the most perfect government is that which guides men in the manner most in accordance with their own natural tendencies and inclinations." The question is a question of the philosophical period. The answer opens the door for the historical jurist. "L'Esprit des Lois" (1748) is the development of this answer. It holds that "there is no one best form of state or constitution: no law is good or bad in the abstract. Every law, civil and political, must be considered in its relation to the environment, and by the adaptation to that environment its excellence must be judged." [42] Savigny, too, taught this doctrine, though it is true he emphasized the elements of race and nationality as conditioning factors, whereas climate, geographical conditions, differences of forms and degrees of civilization, were all-important in the mind of Montesquieu. Montesquieu's great influence is to be explained neither by the elegance of his diction nor by the vulgar appeal of some of the Persian Letters, but rather by the fact that men's minds were ready to question the philosophical theories that had held undisputed sway for so many generations. The Encyclopedists represent the philosophical background of Montesquieu's jurisprudence. For a generation French jurisprudence consisted of attacks on and defenses of the "Esprit des Lois." [43] It had barely accomplished its work of opening men's minds to the mutability of laws when the forces of the Revolution were set free.

(*c*) *Philosophical Schools*

Turning backwards in the pages of history we can set our law reformer in an epoch when reform is not by Legislation but by Equity, when resort must be had to a court to have conduct declared proper and therefore in accordance with law. He will hardly be so independent of the law in the books as is the con-

[42] GREAT JURISTS, 427. Though Montesquieu thus gets away from the older Law of Nature, he does not abandon the concept, but he defines Natural Laws as those "derived wholly from the constitution of our nature." Bk. I, ch. 2, 3.

[43] About twenty-five titles are collected in ARMAND GASTON CAMUS, PROFESSION D'AVOCAT, vol. II, BIBLIOTHÈQUE CHOISIE DES LIVRES DE DROIT, 1772 (5 ed., DUPIN, AÎNÉ, 1832), 25–27.

structive jurist, nor so dependent on it, accidents and all, as the historical jurist. He will seek general principles by which to test the law that is placed before him, and he will argue that what does not correspond with these principles is not law, though it may have been so declared; and what is dictated by these principles is law though it has never been declared in so many words. Positive law is a mere approximation to *the* law, and constantly subject to correction by the mere process of showing a court wherein it falls short. It makes little difference whether he finds his principles in a "word of God," or conscience, a Law of Nature newly observed, or a Law of Nature discovered by the Ancients, whether "Nature" means human nature or something superhuman — he is a philosophical jurist. He is not constructive, for it is not his business to *make* the law, the law is there to be *found;* yet he is not historical, at least not primarily, though he may make history itself one of the means for the revelation of his principles.[44]

Sir Frederick Pollock has spoken of the continuity of the Law of Nature theory in legal history, but a fairer alternative is suggested by Sir John MacDonnell: that the history of jurisprudence is marked by an often-renewed attempt to revive in a new form the conception of a Natural Law, of a "*richtiges Recht.*" [45] The Equity periods generally develop this type of jurisprudence. The eclectic Cicero's acceptance of the Stoics' Natural Law is the philosophic reflection of the growing Edict of the Praetors. Through this Edict the law common to the nations (the little Italian gentes) became the Law of Nature. In another Natural-Law period, the seventeenth century, this Law of Nature was destined to become the Law of Nations in a bigger sense (the law binding on states). The glide from the Law of Nations to the Law of Nature in the old Roman sense is not without a parallel today. After an exhaustive study of comparative law a people is likely to realize that the likenesses are more essential than the differences,

[44] "People who quite honestly believe themselves to possess infallible means of knowing what ought to be, will hardly spend their time on the humbler task of learning from the experience of what has been." Sir Frederick Pollock, JOURN. SOC. COMP. LEGIS., N. S., 1903, No. 1, 81. The same remark applies to the Constructive Schools.

[45] Sir Frederick Pollock, "The History of the Law of Nature, a Preliminary Study," JOURN. SOC. COMP. LEGIS., vol. II, N. S., 1900, No. 3, 418; 1 COL. L. REV. 11. *Cf.* SIR JOHN MACDONNELL, Introduction to BEROLZHEIMER'S THE WORLD'S LEGAL PHILOSOPHIES, xxxii.

and a distinction between the essential and the incidental in law is apt to lead into one phase or another of a *jus naturae*.[46] France, as we shall see, the first country of Europe to achieve a modern code, has led in Comparative Jurisprudence for several generations. Now that it is passing into the second stage of its relations with the code, it is witnessing a *renaissance du droit naturel*, the distinguishing feature of a Philosophical Jurisprudence.[47] Contemporary Italy is a close second.[48] But whatever the genesis of Philosophical Schools, Equity, as a means of legal development, cannot flourish without the theory that there is an enforceable norm for conduct independent of the positive law. A jurist of the legislative period may be inspired by an ideal of Natural Law; a glossator may believe that his code embodies Nature's decrees; but Equity *must* make its appeal to the natural. The vagueness of the idea seems rather a help than a hindrance. Long before Equity emerged triumphant in England as coördinate with the law, or rather superior to it,[49] Englishmen had read that in Utopia the law was the Law of Nature.[50] Hooker (1553–1600) had laid

[46] The learned editor of the JOURNAL OF COMPARATIVE LEGISLATION has not escaped this spell. In his essay on Leibnitz (GREAT JURISTS, 301) he says: "But is there an end of the idea of Natural Law? May it not, revised in the light of psychology, history, and comparative jurisprudence, have a future before it?" *Cf.* also preceding note. The comparative jurists of Germany are also just beginning to look forward to the next stage. Stammler's accord with the French "natural law with a variable content" — a sort of comparative natural law theory — is the first fruit. The American lawyers, dealing daily with the laws of many jurisdictions as fundamentally the same, are for the same reason a little more apt to see in the common law a kind of natural law than is the Englishman.

[47] *Cf.* JOSEF CHARMONT (b. 1859), LA RENAISSANCE DU DROIT NATUREL (1910). The Glossatorial Jurists of France during the 1800s had, of course, ignored "philosophy." But the last twenty-five years have witnessed the inspiration of an idealist philosopher, ALFRED FOUILLÉE (1838–1912), L'IDÉE MODERNE DU DROIT (1878), and a great philosophical jurist, Raymond Saleilles. "A host of younger men" we are told in SCIENCE AND LEARNING IN FRANCE, 1917, 154, "now cultivate this field with such originality and success that for the philosophy of law of the coming generation, the French systems are vital for every American student." See MODERN FRENCH LEGAL PHILOSOPHY (MODERN LEGAL PHILOSOPHY SERIES, No. 7).

[48] As represented in GEORGIO DEL VECCHIO, THE FORMAL BASES OF LAW, 1905–08 (MODERN LEGAL PHILOSOPHY SERIES, No. 10).

[49] 1616 is a convenient date for the localizing of this gradual process; in that year Lord Coke was unsuccessful in his effort to prosecute defendants in common-law actions who had applied to the Chancellor for injunctions to stop the plaintiff's proceeding, and the King having been appealed to, decided in favor of the Chancellor.

[50] SIR THOMAS MORE (1476–1535), DE OPTIMO REPUBLICAE STATU, DEQUE NOVA INSULA UTOPIA, 1516, Bk. II; "They define virtue thus, that it is a living according to

Nature's Law down as one of the tests of human law.[51] A learned Italian, Albericus Gentilis (1551–1611), taught a Natural-Law jurisprudence at Oxford.[52] Bacon (1561–1626) assumed the existence of a Law of Nature, though he would probably seek it in a new way.[53] Soon the idea became one of the commonplaces of literature. Nathanael Culverwell (1612–51) wrote about the "Light of Nature." [54] The greatest scholar of the day, John Selden (1584–1654), drew from the laws of the Hebrews a type of Natural Law.[55] Zouch (1590–1661), Hobbes (1588–1679), Cumberland (1632–1719), Locke (1632–1704), and their successors in England and the Colonies,[56] differing as they did in many respects, agreed

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Nature, and think that we are made by God for that end; they believe that a man then follows the dictates of Nature when he pursues or avoids things according to the direction of reason. . . . They have but few laws. . . . They have no lawyers among them." SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, had mentioned Natural Law only to dismiss it rather brusquely (ch. XVI). *Cf.* POLLOCK, 1 COL. L. REV. 27. But *cf.* his OPUSCULUM DE NATURA LEGIS NATURAE, in WORKS (ed. Clermont, 1869), 63–184, 187–333.

[51] RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY, *circa* 1592–1647.

[52] DE LEGATIONIBUS, 1585; DE JURE BELLI, 1589; DE ADVOCATIONE HISPANICA, 1613. COLEMAN PHILLIPSON, GREAT JURISTS, 109 *ff.*, minimizes the Natural Law element in Gentilis. Still Professor Holland, the rediscoverer of Gentilis, in ELEMENTS OF JURISPRUDENCE, ch. III, recognizes the Law of Nature as the scaffolding upon which Gentilis built, and in his article in ENCYCLOPAEDIA BRITANNICA he says: "He uses the reasonings of the civil and even the canon law, but he proclaims as his real guide the JUS NATURAE, the highest common sense of mankind, by which historical precedents are to be criticized and, if necessary, set aside." Thus in DE JURE BELLI, III, 9: *Naturalis ratio, quae est auctor juris gentium.* See GREAT JURISTS, 119.

[53] Argument in favor of the *Post-Nati*, quoted in GREAT JURISTS, 165. For other instances of the Law of Nature in court see Andrew Amos's learned note to FORTESCUE'S DE LAUDIBUS, ch. XVI (antagonistic). In popular jurisprudence its currency is represented in GERARD MALYNES, LEX MERCATORIA, 1622.

[54] AN ELEGANT AND LEARNED DISCOURSE OF THE LIGHT OF NATURE, 1652 (ed. Brown, 1857). *Jus Naturae* is presented as a code of law self-existent and antecedent to all human law.

[55] DE JURE NATURALI ET GENTIUM JUXTA DISCIPLINAM EBRAEORUM, 1640.

[56] RICHARD ZOUCH, JURIS ET JUDICII FECIALIS, SIVE JURIS INTER GENTES ET QUAESTIONUM DE EODEM EXPLICATIO, 1650: "When many men at different times affirm the same thing this fact must be referred to an universal cause, which can be nothing else than a right conclusion flowing from the principles of Nature, or else some common consent; the former indicates the Law of Nature, the latter the Law of Nations." (Quoted and translated, HERON, 442.)

THOMAS HOBBES, DE CIVE, 1642; HUMAN NATURE, OR THE FUNDAMENTAL ELEMENTS OF POLICY, 1650; DE CORPORE POLITICO, 1650; LEVIATHAN, OR THE MATTER, FORM AND POWER OF A COMMONWEALTH, ECCLESIASTICAL AND CIVIL, 1651; OF LIBERTY AND NECESSITY, 1654.

in beginning with a Law of Nature as the underlying basis of all things.

Learned Europe was united in the seventeenth century by the use of the Latin language, and the exaltation of Natural Law was not limited to England. In fact, it did not originate there. It may be well before passing to its representatives in Continental Europe to consider what Nature meant in another field of thought to the savants of those days. The literary criticism of this period was very fond of the word "Nature." Much of its wit and wisdom eventually found its way into Pope's "Essay on Criticism" (1711). After setting up Unerring Nature as "at once the source, the end, the test of art," Pope hastens to explain that "Nature" means the classical standards of the Ancients:

> Those rules of old discovered, not devised,
> Are Nature still, but Nature methodized.

This idea ran through the literature of the seventh century both in England and on the Continent. Thus Rapin (1672) says of Aristotle's

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SIR ROBERT WISEMAN, LAW OF LAWS, OR THE EXCELLENCY OF THE CIVIL LAW ABOVE ALL OTHER HUMANE LAWS WHATSOEVER, 1657.

RICHARD CUMBERLAND, DE LEGIBUS NATURAE DISQUISITIO PHILOSOPHICA, 1672.

JOHN LOCKE, TWO TREATISES ON GOVERNMENT, 1690.

JAMES TYRRELL, BRIEF DISQUISITION ON THE LAW OF NATURE (based on CUMBERLAND), 1692.

Among the later English writers on Natural Law are: THOMAS WOOD, A NEW INSTITUTE OF THE IMPERIAL OR CIVIL LAW WITH [comparative] NOTES, 1705; INSTITUTE OF THE LAWS OF ENGLAND OR LAWS OF ENGLAND IN THEIR NATURAL ORDER ACCORDING TO COMMON USE, 1720; T. RUTHERFORTH, INSTITUTES OF NATURAL LAW, 1754–56; RICHARD WOODDESSON, ELEMENTS OF JURISPRUDENCE, treated in the preliminary part of a course of lectures on the Laws of England, 1783; SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND, as treated of in a course of Vinerian Lectures at Oxford, commencing in 1777, 1792–93; and SIR WILLIAM BLACKSTONE (1723–80), COMMENTARIES ON THE LAWS OF ENGLAND, 1765–69, Introduction, § II.

A belated work of this kind by a recalcitrant pupil of Austin is CHARLES JAMES FOSTER'S ELEMENTS OF JURISPRUDENCE, 1853.

For references on Natural Law in the American Colonies see "Select Essays" in ANGLO-AMERICAN LEGAL HISTORY, I, 418, 437, 451.

In America, besides the Declaration of Independence, 1776, and the Bills of Rights in the various Constitutions, which were drawn up under the influence of the Law-of-Nature theory, we have the lectures of one of our first law professors, James Wilson (1742–98), WORKS, . . . including LECTURES AS PROFESSOR OF LAW, 1790–92 (eds. 1804, 1896, ch. II and III). (OF THE GENERAL PRINCIPLES OF LAW; OF THE LAW OF NATURE.) The Natural-Law theory has furnished one of the most important cross-currents in the later American writings on Jurisprudence, the main tendencies in which have been Analytical and Historical. The American jurists will be the subject of a separate study by the present writer.

rules; "If you consider them well, you will find that they are merely made to methodize Nature, to follow her step by step." [57] And so, going back to the time when the Reception of Roman Law followed in the wake of the Renaissance and the Reformation, we can understand the enthusiasm of the Humanist jurists of France and Italy for Roman Law: to them it was Natural Law methodized.[58] It was more than this, it was the will of the Author of Nature.[59]

When we read of the astounding work of Cujas in making historical studies that reach back of Justinian we must not endow him with thoughts of our own time. He was not anticipating Savigny's theory that true law is a development, a growth; he was simply seeking the sources of Roman Law, the undefiled fountainhead of the Law of Nature. Far from believing in an evolution from the lower forms to the higher, he was trying to get back to a Golden Age. It is therefore misleading to confound his school with Historical Schools in the modern sense. He simply represents a second phase of the commentation stage in Continental Law. The

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[57] RÉFLEXIONS SUR LA POÉTIQUE, § xii.

[58] This notion has persisted in one form or another down to our own times. Thus EDWIN CHARLES CLARK, PRACTICAL JURISPRUDENCE, 1883, 3: "By far the wider utility of the subject [Roman Law] lies in its connexion with Jurisprudence, from which the study of Roman Law can never be separated without the greatest detriment to both, coupled with which, that study is most profitable towards the acquisition of sound principles and clear ideas as to law in general." In the same spirit John George Phillimore inspired by a passage in D'Aguesseau on the Natural Law hidden in the maxims of Roman Law, wrote his PRINCIPLES AND MAXIMS OF JURISPRUDENCE, 1856. About the same time Nathaniel Lindley published AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE, BEING A TRANSLATION OF THE GENERAL PART OF THIBAUT'S SYSTEM DES PANDEKTENRECHTS, 1855. In 1853 CHARLES JAMES FOSTER (ELEMENTS OF JURISPRUDENCE, 2) complained that Jurisprudence was lumped with Civil Law in the Inns of Court.

[59] Thus GROTIUS: *Jus Naturae est dictatum rectae rationis . . . ac consequenter ab Auctore Naturae Deo.* There was an earlier Natural Law, among the theologians before the Renaissance, while the Canon Law was going through a Commentation or generalizing stage. See my note on the history of Canon Law in 65 U. OF PA. LAW REV. 749. This theological Natural Law is represented in ST. THOMAS AQUINAS (1228–74), SUMMA THEOLOGIAE; DE REGIMINE PRINCIPUM. St. Thomas was followed by some of the earlier modern writers, notably by Hooker. On Natural Law in Gratian see POLLOCK, JOUR. SOC. COMP. LEGIS., N. S., 1900, No. 3, 423; 1 COL. L. REV. 11. The Natural Law of the Church like other Natural Laws had its inception as early as the days of Saint Augustine in a clash between conflicting systems. The *Mosaicarum et Romanarum Legum Collatio* attributed to this period was an attempt to reconcile the laws of the Empire with the dictates of the conscience of a Christian.

first, that of the Bartolists,[60] had brought emancipation from the words of the code by concerning itself with a minute study of the substance of the rules. In course of time, it is true, it had buried the code beneath its dissertations. The Humanists rebelled against all this Mediævalism, believing that they could understand the true spirit of Roman Law better than could the scholastic scribblers of barbarous Latin. Glosses and commentaries were to be consigned to the rubbish-heap, and centuries of juristic work forgotten. This is hardly an historical program, but there is a philosophy back of it — at first only dimly felt, but soon the common knowledge of every jurist and publicist in Europe: Roman Law is Reason, the Law of Nature.

It will suffice here to mention only a few of the greater names. Spain had been the foremost nation of Europe before the Revival of Learning. Its Romanesque Law had assumed the form of a code under Alphonso the Wise (*r.* 1252–82) and after several centuries of interpretation of the kind that generally follows codes, Vasquez (*fl.* 1509–66), Victoria (sixteenth century), Soto (1494–1560), and Suarez (1548–1617) developed the Law of Nature that had been neglected during the ascendancy of the Code. Balthazar Ayala (1548–84) carried this learning to the Netherlands.[61] In the Dutch School, Grotius (1583–1645)[62] built International Law on the foundation of the Law of Nature. Vinnius (1588–1637), Spinoza (1632–77), and a distinguished line of publicists ending in Bynkershoek (1673–1743) continue their building on the same foundation.[63] In France Bodin (1550–1627)

[60] Bartolus (1314–57) himself had a means of bridging the gap between the actual positive law of his day and the Roman Law, which represented the law as it ought to be. To him Roman Law was the law *de jure*. Other customs and regulations were in force *de facto*. His theory of the relation between the state and the law has been made the subject of a recent study: CECIL W. SIDNEY WOOLF, BARTOLUS OF SASSOFERRATO, HIS POSITION IN THE HISTORY OF MEDIAEVAL POLITICAL THOUGHT, 1913.

[61] VASQUEZ, CONTROVERSIAE ILLUSTRES; FRANCIS DE VICTORIA, RELECTIONES THEOLOGICAE, V. DE INDIS, VI; DE JURE BELLI; DOMINIC SOTO, DE JUSTITIA ET JURE, 1580; FRANCISCUS SUAREZ, DE LEGIBUS AC DEO LEGISLATORE, 1579; BALTHAZAR AYALA, DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI, 1597.

[62] HUGO GROTIUS, DE JURE BELLI ET PACIS, 1625. He attempted to separate Instituted Law from Natural Law. "For Natural Law, as being always the same, can be easily collected into an Art; but that which depends upon institution, since it is often changed, and is different in different places, is out of the domain of Art" (quoted in GREAT JURISTS, 179; *cf. ib.* 180).

[63] VINNIUS, INSTITUTIONUM IMPERIALIUM COMMENTARIUS, pub. 1665. BARUCH

bases his Republic on the concept.[64] Godefroy (1587–1652), Favre (1557–1624), Domat (1625–95), D'Aguesseau (1668–1751), and Pothier (1699–1772), and in Switzerland Burlamaqui (1694–1748) and Vattel (1714–67), develop the idea.[65] In Italy the many-sided Vico (1668–1743), like the English Bacon, has a more modern idea of what it is and how to find it — he even anticipates Montesquieu in his recognition of historical relativity — but he still holds to a Law of Nature.[66] Beccaria (1735–83), Filangieri (1752–88), and a series of writers who vacillate between the schools of France and those of Germany, carry on the tradition to its quiescence in Italy.[67] Germany was the last of the nationalities of Western Europe to develop the Law of Nature. It is borrowed from the Dutch School through the Swedish Baron Pufendorf (1632–94),[68] the first professor of the Law of Nature and of Nations in Germany,

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SPINOZA, TRACTATUS THEOLOGICO-POLITICUS, 1670; TRACTATUS POLITICUS, 1678 (a fragment). In the latter work, ch. 2, § 4: *Per jus. . . . Naturae intelligo ipsae naturae leges seu regulas, secundum quas omnia fiunt.* CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM, 1702; OBSERVATIONES JURIS ROMANI, 1710–33; DE DOMINO MARIS, 1721; QUAESTIONES JURIS PUBLICI, 1737. Though Bynkershoek would base International Law on Custom, he leaves the door open for Natural Law in holding that "'*nullus*' *ullorum hominum auctoritas ibi valet, si ratio repugnet.*"

[64] JEAN BODIN, DE LA RÉPUBLIQUE, 1577; JURIS UNIVERSI DISTRIBUTIO, 1591. In the latter work law is said to be twofold, human and natural; natural law is inculcated by our reason, human law is the work of man.

[65] Some of these are perhaps more closely allied with the Analytical School, where their works will be mentioned (*cf.* note 85, below). Henri François D'Aguesseau, in a series of essays entitled MÉDITATIONS MÉTAPHYSIQUES SUR LES VRAIES OU LES FAUSSES IDÉES DE LA JUSTICE, discusses the question whether man finds in himself the natural ideas of the just and the unjust. He was deeply interested however in the idea of legislation and codification, a taste of which France had had in the work of Louis XIV at the end of the seventeenth century. The Swiss publicist Jean Jacques Burlamaqui has been the widest-read teacher of Natural Law outside of Germany. He wrote PRINCIPES DU DROIT NATUREL, 1747, and PRINCIPES DU DROIT POLITIQUE, published posthumously, 1751. EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉE À LA CONDUITE ET AUX AFFAIRES, DES NATIONS ET DES SOUVERAINS, 1758 (based on WOLFF).

[66] GIOVANNI BATTISTA VICO, PRINCIPII D'UNA SCIENZA NUOVA, 1725. DE UNIVERSI JURIS UNO PRINCIPIO ET FINE UNO, 1720. Excerpts in English are in HERON, *op. cit.* 535–586. On Natural Justice see page 540.

[67] CESARE BONESANO, MARCHESE DI BECCARIA, DEI DELITTI E DELLE PENE, 1764. GAETANO FILANGIERI, LA SCIENZA DELLA LEGISLAZIONE (1780–88). JOHANNIS FR. FINETTI, DE PRINCIPIIS JURIS NATURAE ET GENTIUM, 1777; this was directed *adversus Hobbesium, Puffendorfium, Thomasium, Wolfium et alios.*

[68] SAMUEL VON PUFENDORF, SYSTEMA JURIS NATURAE ET GENTIUM, 1672; ELEMENTA JURISPRUDENTIAE UNIVERSALIS, 1669.

acquiesced in by the cosmopolitan Leibnitz (1646–1716),[69] and by the lesser lights, Rachel (1628–91), the open-minded Thomasius (1655–1728), Gerhard (1682–1718), Grundling (1671–1729), Achenwall (1719–72).[70] But the climax of its pretensions is reached in the work of the man who calls himself Professor *Generis Humani:* Christian Wolff (1679–1754), in his "Institutiones juris naturae et gentium in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur" (1754), unintentionally reduces the Law of Nature *ad absurdum* and plays into the hands of its enemies. At length, as we have seen, it disappears as a vital force in the jurisprudence of each country: first in France and Italy, later in Germany, then in England, and finally in America, in spite of the petrifaction of some of its catchwords in documents of national importance.[71] Far from the halls of justice, philosophers still conjure with it,[72] reformers appeal to it — but with this limitation: no one argues that it is the law of our courts *proprio vigore.* Only in Scotland was it still respected. Beginning with Continental traditions, its lawyers were prevented from sharing in the movements of related systems in the nineteenth century, with the result that it still cherished the Law of Nature a century after

[69] GOTTFRIED WILHELM VON LEIBNITZ, METHODI NOVAE DISCENDAE DOCENDAEQUE JURISPRUDENTIAE, 1667; CODEX JURIS GENTIUM DIPLOMATICUS, 1693.

[70] SAMUEL RACHEL, DE JURE NATURAE ET GENTIUM DISSERTATIONES DUAE, 1678; CHRISTIAN THOMASIUS, FUNDAMENTA JURIS NATURAE ET GENTIUM, EX SENSU COMMUNI DEDUCTA, 1705–18; EPHRAIM GERHARD, DELINEATIO JURIS NATURALIS, 1712; NICHOLAS JEROME GRUNDLING, VIA AD VERITATEM JURIS NATURAE, 1714–28; JUS NATURAE ET GENTIUM, 1728; GOTTFRIED ACHENWALL, JUS NATURAE, 1750; OBSERVATIONES JURIS NATURAE ET GENTIUM, 1750; PROLEGOMENA JURIS NATURAE, 1748; CHRISTIAN WOLFF, PHILOSOPHIA CIVILIS SIVE POLITICA, 1746; JUS GENTIUM, 1749; JUS NATURAE METHODO SCIENTIFICA PERTRACTATUM IN DECEM TOMOS DISTRIBUTUM, 1740–47.

[71] The appeal of the Declaration of Independence is to "the laws of nature and of nature's God," and the reasons that make against revolutions are reduced to "prudence."

[72] The leading German philosophers who adhered to a modified Law-of-Nature concept in the 1800s were Adolf Trendelenburg (1802–72); Karl Chr. Fr. Krause (1781–1832), Heinrich Ahrens (1808–74), and Karl D. Röder (1806–79). On the other hand the prevailing tendency has been away from *Naturrecht* as in Felix Dahn (b. 1834) and Adolph Lasson (b. 1832). The most ambitious attempt to revive Natural Law in America has perhaps been that of GEORGE HUGH SMITH, THE ELEMENTS OF RIGHT AND OF THE LAW, 1886 (2 ed., 1887). Here as in Germany, philosophers, as distinguished from jurists, and perhaps in criticism of the jurists, busy themselves from time to time with the Law-of-Nature concept. *Cf.* JOURN. PHIL., PSY. AND SCI. METHOD, vol. XI, 345–48; *ib.* vol. XII, 141.

it was neglected elsewhere. The typical work of this epoch is James Lorimer's "Institutes of Law, a treatise of the principles of Jurisprudence as determined by Nature." [73]

It is hardly possible to lay down a definition of law that will suit all of the philosophic schools, but if we were to attempt it, we should certainly avoid drawing the line between what is and what is not law by reference to anything so accidental as a formal enactment or pronouncement of a sovereign or even the accidents of history except as those accidents affected Nature. We should look for something with universal applicability; we should seek the essential and avoid the incidental and the arbitrary; and above all we should define law (at least now-a-days) as something connected with and growing out of human nature.

(*d*) *Analytical Schools*

The notion that law is a body of interrelated principles and not merely a haphazard selection of rules, is not inextricably interwoven with that of a transcendental Law of Nature. It is logically applicable to positive law, and has been so applied by the Analytical School. There is, of course, in the name itself nothing to prevent its use with reference to those who would analyze a code or statutes. There are jurists of this type and they are sometimes described as analytical.[74] But *the* Analytical School is quite different. It is not interested in accidental details. It speaks in universal

[73] 1872 (2 ed., 1880). Other works showing Scotch influence include: SIR JAMES MACKINTOSH (1765–1832), DISCOURSE ON THE STUDY OF THE LAW OF NATURE AND NATIONS (delivered 1799); JAMES HUTCHISON STIRLING, LECTURES ON THE PHILOSOPHY OF LAW, 1873; WILLIAM GALBRAITH MILLER, LECTURES ON THE PHILOSOPHY OF LAW, 1884; DATA OF JURISPRUDENCE, 1903; W. HASTIE, preface and notes to OUTLINES OF THE SCIENCE OF JURISPRUDENCE, translated from the German of Puchta, Friedländer, Falck, and Ahrens, 1887; DAVID GEORGE RITCHIE, NATURAL RIGHTS, A CRITICISM OF SOME POLITICAL AND ETHICAL CONCEPTIONS, 1895; WILLIAM ROBERT HERKLESS, LECTURES ON JURISPRUDENCE, OR THE PRINCIPLES OF POLITICAL RIGHTS, 1901.

[74] The work of an Analytical School is likely to be useful to later schools if only, as Sir Henry Maine says, "for the purpose of clearing the head." (EARLY HISTORY OF INSTITUTIONS, Lecture XII.) Its tendency to limit law to positive law is calculated to make the transition from it to a legislative school quite easy. Binding's theory of Norms, and Bierling's modifications, though resembling the Austinian imperative theory, are related to the constructive work of their time in Germany rather than to the attitude of the Analytical schools. *Cf. infra*, note 79, as to Professor Holland and other current Anglo-American Constructive-Analytical jurists.

affirmatives and negatives. It would define all law, classify all laws, discover the essential features of every law, and get a yard-stick by which all laws can be measured. Its critics have accused it of being more interested in the logical working out of a system than in the effect of its rulings. *Fiat justitia, ruat coelum.* This would be a serious charge, indeed, if the School professed to be engaged in the process of law-making — but it is not. Analytical jurisprudence makes its appearance when there is a body of law on which to work, and, what is more, a law that is supposed to be worth analyzing because consistent with itself and all-inclusive. Neither the Analytical nor the Philosophical School can thrive on the piecemeal work of a modern legislature, nor under the illiberal hand of a rigid code of positive law. Not that you can forbid men to philosophize; but you can render their legal philosophies more or less nugatory by the form in which you cast their law. Philosophical and Analytical Jurisprudence have one other phase in common. The latter, it is true, says nothing of the Law of Nature — though it may easily lapse into it,[75] or bridge the chasm between positive and transcendental laws by one theory or another.[76] Still, the very notion that there is a universal element in laws that can be made the basis of an analysis, the very notion that there are parts in a legal system that fit together as neatly, as inevitably, as wonderfully as the coincidences of mathematics, is a kind of admission that the handiwork of Nature is visible in law. As several eighteenth-century writers who were both philosophical and analytical expressed it, they sought to arrange the laws in their "natural order." [77] It is not surprising to find the learned Doctor Heinrich Brunner classifying the theories of Austin and Bentham as *naturrechtlich.*[78]

The greatest exponent of this school, the intellectually honest Austin, comes at the end of its active career in England, not at the beginning as is often erroneously assumed. Further, not everything in Austin's theory of the universe is essential to the

[75] As in AUSTIN, LECTURES II–IV.

[76] As in the case of Hobbes and Locke, see below, *ap.* note 82.

[77] *Cf.* notes as to Wood (55) and Domat (85).

[78] In the Introduction to HOLTZENDORFF'S ENCYCLOPEDIE (3–5 eds.), translated in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, II, 51, somewhat freely, see POLLOCK, HISTORY OF THE SCIENCE OF POLITICS (ed. 1908), 104, 111. *Cf.* Pollock, "History of Comparative Law," JOURN. SOC. COMP. LEGIS., N. S., 1903 (vol. V), No. 1, 85.

Analytical School. Thus if we were to seek a definition of law for the school that attempts to make a scientific study of what the law is (when all agree that it is a body of correlated principles), we should not be forced to the Austinian command, though that would suit very well, as indeed it would in any theory of positive law. We should certainly limit ourselves to ascertainable, perhaps to "municipal," law, and should avoid alike the suggestion that man is impotent to change the kind of law with which we deal, and the other extreme, that law is a series of unrelated whims or *ex post facto* decrees of the law-maker. Austin did his work quietly before the power of legislation had been revealed in England.[79] That his formulas were readily adaptable to the conditions that became obvious after his death is a wonderful testimony to the thoroughness of his work. But his work is not of the legislative period. Professor Holland, who attempts to continue it, must change his book every time a new law is passed.[80] At best the

[79] JOHN AUSTIN (1790–1859), PROVINCE OF JURISPRUDENCE DETERMINED, 1832; LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW, delivered 1828–32, published posthumously, 1861–63. The greatest power of legislation is not realized in England until after the Reform Bill of 1832. That Austin comes at the end and not at the beginning of his school has been observed by Sir Frederick Pollock. After denying his own allegiance to the Analytical School, he remarks: "It may be that I love Hobbes a little too well to be perfectly just to his successors, who to my thinking have often got more praise than they deserved for repeating Hobbes' ideas in clumsier and really less exact words." Preface to FIRST BOOK OF JURISPRUDENCE, vii.

[80] THOMAS ERSKINE HOLLAND, ELEMENTS OF JURISPRUDENCE, 1880 (eds. 1882, 1886, 1888, 1890, 1895, 1896, 1900, 1906, 1910, 1917). Though each edition differs from its predecessor chiefly in taking note of changes in the law, the learned author states that the twelfth edition may be regarded as final. *Cf.* however his statement in ch. I: "It follows that Jurisprudence is a progressive science. Its generalizations must keep pace with the movement of systems of actual law." Austin has found many imitators and disciples in spite of the changed condition. While his definition of law is admirably suited to legislation, in the actual analysis, all of these writers labor under the same handicap as Professor Holland: SIR WILLIAM MARKBY, ELEMENTS OF LAW CONSIDERED WITH REFERENCE TO PRINCIPLES OF GENERAL JURISPRUDENCE, 1871 (6 ed., 1905); SHELDON AMOS, A SYSTEMATIC VIEW OF THE SCIENCE OF JURISPRUDENCE, 1872; THE SCIENCE OF LAW, 1874; WILLIAM EDWARD HEARN, THE THEORY OF LEGAL DUTIES AND RIGHTS, AN INTRODUCTION TO ANALYTICAL JURISPRUDENCE, 1883; HENRY TAYLOR TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, EXPOUNDED WITH A VIEW TO ITS ARRANGEMENT AND CODIFICATION, 1884; JOHN WILLIAM SALMOND, ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY, 1891; FIRST PRINCIPLES OF JURISPRUDENCE, 1893; JURISPRUDENCE, OR THEORY OF LAW, 1902 (5 ed., 1916); WILLIAM JETHRO BROWN, THE AUSTINIAN THEORY OF LAW, 1906; THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION, 1912.

analytical method can yield in such a period a stocktaking of the condition of the law from time to time.[81] The truth is that general principles are no longer supreme in our law, and we cannot write an analytical jurisprudence today that will not be a Procrustean bed for the living, growing content of the law. Austin's connection, I have suggested, is with the past. He worked on Blackstone's principles. Blackstone (1723–80) in turn had used Hale's Analysis of the Law.[82] In Hale's century (1609–76) two famous attempts were made to bridge the gap between a jurisprudence of positive law and a philosophical jurisprudence of Natural Law. Hobbes taught that man in society surrendered all of his Natural Rights to escape the bellicose state of Nature. Locke taught that men organized governments to execute the behests of Nature through their positive law. The gap was at least recognized by Lord Coke when he contrasted the "artificial reason and judgment of the law" with "natural reason." [83] His great contemporary and antagonist, Bacon, was the first of a series of thinkers who proposed the reducing of this artificial reason to natural reason.

In other countries some kind of Analytical School accompanies the Philosophical School; that is, some kind of principle-seekers supplement the work of those who would apply principles to life in the making of laws. In contemporary France (now reëntering the philosophical stage) we are told of Planiol of Paris, "whose books entitled 'Elementary Jurisprudence' represent most nearly what we are accustomed to term 'Analytical Jurisprudence.'" [84] Among the eighteenth-century jurists of the Continent it would be a little harder to separate the analysts from the philosophers, because of the peculiar assumption then current that Roman Law

[81] *Cf.* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW, 1909, § 10.

[82] MATTHEW HALE, ANALYSIS OF THE LAW, BEING A SCHEME OR ABSTRACTS OF THE SEVERAL TITLES AND PARTITIONS OF THE LAW OF ENGLAND, DIGESTED INTO METHOD, n. d. (ed. 1713 with his HISTORY). *Cf.* SIR WILLIAM BLACKSTONE, "Analysis of the Laws of England" (in TRACTS, 3 ed., 1–129).

[83] 12 COKE, 63: "Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature: but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it" (1608).

[84] SCIENCE AND LEARNING IN FRANCE, 1917, 155.

and the Law of Nature were identical. Of Heinecçius (1681–1741), one of the Germans, the author of "Elementa Juris Civilis secundum ordinem Pandectarum," (1740), Sir James Mackintosh said that he was the best writer of elementary books with whom he was acquainted on any subject.[85] Others who produced analytical books, mere "digests of Roman Law stripped of its details," were Ickstedt (1702–76), Nettelbladt (1719–91), Baumgarten (1714–82), and Bach (1721–58).[86] I fancy, however, that Leibnitz is as worthy of the name of "Analytical Jurist" as any of the Germans. He it was who vigorously criticized the illogical division of law in the Institutes: Of Persons, Of Things, Of Actions. All actions are among persons concerning things. Accordingly he planned a new division and urged its adoption in one work embracing the Code, Novels, Institutes, and Digest of Justinian.[87] He believed that nothing approached so near the method and precision of geometry as did the Roman Law.[88] And throughout the philosophical period there were others who attempted to analyze the positive law of Rome, even as far back as the great systematizer, the bitter opponent of Cujas, Doneau (1527–91).[89]

(e) *Comparative-Apologetic Schools*

Let us finally turn back one more page of history to the point where legal study is by Glossation, and growth is surreptitious.

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[85] DISCOURSE (ed. 1835), 4.

[86] J. A. F. VON ICKSTEDT, ELEMENTA JURIS GENTIUM, 1740; DAN NETTELBLADT, SYSTEMA ELEMENTARE UNIVERSAE JURISPRUDENTIAE NATURALIS USUI JURISPRUDENTIAE POSITIVAE ACCOMMODATUM, 1749; ALEXANDER GOTTLIEB BAUMGARTEN, JUS NATURAE, 1765; J. A. BACH, HISTORIA JURISPRUDENTIAE ROMANAE, 1754; OPUSCULA AD HISTORIAM ET JURISPRUDENTIAM SPECTANTIA, 1767; JOHANN GOTTLIEB HEINECCIUS, ELEMENTA JURIS NATURAE ET GENTIUM, 1738; PRAELECTIONES ACADEMICAE IN H. GROTII DE JURE BELLI AC PACIS LIBROS, 1744; PRAELECTIONES ACADEM. IN SAM. PUFENDORF. DE OFFICIO HOMINIS ET CIVIS, 1742. Here may be mentioned the analytical works of the French jurists: JACQUES GODEFROY, MANUALE JURIS; CODEX THEODOSIANUS, 1655; ANTOINE FAVRE, CONJECTURARUM JURIS CIVILIS, 1580; RATIONALIA IN PANDECTAS, 1604; CODEX FABRIANUS, 1606; JEAN DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATUREL, 1766; ROBERT-JOSEPH POTHIER, PANDECTAE JUSTINIANEAE IN NOVUM ORDINEM DIGESTAE, 1748.

[87] HERON, 526 *ff.*; GREAT JURISTS, 297.

[88] OPERA, IV, 254, quoted in MACKINTOSH, DISCOURSE (ed. 1835), 20.

[89] HERON, 256: "Doneau taught a contrary doctrine to that of Cujas. With him law was a sort of geometrical system and method of deciding all civil and political affairs."

Here too there are jurists who limit their vision to the given law and others who look about for new ideas and standards, though the range of activity of both classes is necessarily limited. What can the restless spirit do when set down amid a group of glossators with a perfect, or supposedly perfect, code — in modern Germany, for example, or in France of the last century? In both of the instances mentioned the most popular avenue of escape has been through comparative law. Among the great names in nineteenth century France in this field are Fustel de Coulanges, Dareste, Gide, Laveleye, Letourneau, Tarde, Arbois de Joubainville, the brothers Révillout, in the department of comparative legal history; and in the field of comparative contemporary law France has long been in the lead. There was a chair of Comparative Law at the Collège de France as early as 1830, and another, limited to Criminal Law, at the Sorbonne.[90] The French Société de Législation Comparée, founded in 1869, is the oldest of its kind. Only recently has Germany rediscovered this field and taken possession of it through the work of Josef Kohler (b. 1849) and his associates. The German societies for the study of Comparative Law are a generation younger than the French.[91] Nineteenth-century Italy, like France, was equipped with a code. Though it was not a native code, though Italian nationality had reached its lowest point, in the middle of the century Emerico Amari (d. 1870) published his "Critica di una scienza della legislationi comparate,"

[90] *Cf.* the French works showing an interest in comparative law shortly after the Code. In CAMUS, PROFESSION D'AVOCAT, vol. II (5 ed., 1832) there are fourteen works (Nos. 1998–2011) on DROIT ROMAIN CONFÉRÉ AVEC LE DROIT FRANÇAIS NOUVEAU, and six (2012–17) on DROIT FRANÇAIS ANCIEN CONFÉRÉ AVEC LE NOVEAU. *Cf.* also No. 129. Several English works were produced directly under the influence of the French Code, *e. g.*, BLAXLAND, CODEX (cited below, note 91), and BRYANT BARRETT, CODE NAPOLÉON, verbally translated, to which is prefixed an Introductory Discourse containing a succinct account of the civil regulations, comprised in the Jewish Law, the ordinance of Manu, the Ta Tsing Leu Lee, the Zend Avesta, the Laws of Solon, the Twelve Tables of Rome, the Laws of the Barbarians, the Assizes of Jerusalem, and the Koran, 1811.

[91] GESELLSCHAFT FÜR VERGLEICHENDE RECHTS- UND STAATSWISSENSCHAFT, 1893; INTERNATIONALE VEREINIGUNG FÜR VERGLEICHENDE RECHTSWISSENSCHAFT UND VOLKSWIRTHSCHAFT, 1894. The (English) Society of Comparative Legislation was founded in 1894. Though Sir Henry Maine had been appointed Professor of Historical and Comparative Jurisprudence at Oxford in 1869, the name assumed by the English Society shows the influence of a French model, rather than a direct continuation of Sir Henry Maine's influence. The Comparative Law Bureau of the American Bar Association was founded by a small group in 1908.

a work in comparative legal history, or Comparative Jurisprudence in the modern sense. Though a little attention is being paid to Comparative Law in England and America today, for an exact parallel we should have to go back to the days when English justice was still untempered with Equity. Here we find little worthy of the name of jurisprudence, but we do find several comparativists who bear a remarkable likeness to the latest Germans in their general attitude. Sir John Fortescue (d. *circa* 1476), for example, has a good word even for the criminals of his own country, as compared with those of France.[92] We have already seen how in the ancient world the observation of the differences between the strict law of Rome and the laws of the Italian gentes served as a stepping stone to Equity. The next great Comparative period in the history of Roman Law came when Imperial and Christian law became definite enough to clash.[93] In one form or another this lasted throughout the Middle Ages, Pope and Emperor jealously watching each other's dominion. The motive for the study of foreign systems is not always the same.[94] Indeed, the Roman story would have us believe that the method was once adopted as the basis of codification. Greek tradition attributes the collecting of constitutions to Aristotle for the purpose of analysis. Leibnitz once tossed off the idea that there ought to be a *theatrum legale*, a universal historical and comparative survey of legislation. Montesquieu saw in a comparative study a means of shaking the faith of his countrymen in the immutability of law.

[92] Sir John Fortescue, De Laudibus Legum Angliae, CC. XIX–XXIII, XXVIII, XXIX, XXXV, XXXVI, XXXVIII–XLIII. In fact most of the intervening chapters are developments of the differences between English and foreign laws. *Cf.* also his De dominio regali et politica called also The difference between an absolute and limited Monarchy as it more particularly regards the English Constitution (On the Governance of the Kingdom of England). In this connection should be mentioned the comparisons of systems actually taught and used in England, that appeared from time to time: Christopher Saint German, Dialogus de fundamentis legum Angliae et de conscientia (Doctor and Student), 1523; William Fulbecke, A Parallel of the Civil, Canon and Common Law, 1602; Thomas Wood, A new institute of the Imperial or Civil Law with notes showing . . . how the Canon Law, the Laws of England and the Laws and Customs of other Nations differ from it, 1704 (4 ed., 1730). George Blackland, Codex Legum Anglicanarum, or a digest of the principles of English Law arranged in the order of the Code Napoléon, 1839.

[93] *Cf.* note 58, *supra*.

[94] *Cf.* Sir Frederick Pollock, "The History of Comparative Jurisprudence," Journ. Soc. Comp. Legis., N. S., 1903, No. 1, 74–89.

Maine used it as a key to English legal history.[95] Nineteenth-century ethnologists and anthropologists with no particular juristic purpose (except as such may have been implied in their several racial theories) have come to it through the path of comparative philology or folklore. Occasionally our legislatures investigate the work of other legislatures to help them in their peculiar problems. In fact a comparison of laws may be found useful and interesting in any stage of the law for one purpose or another. Still there are times when great thinkers reject "a useless quintessence of all systems" in favor of "an accurate anatomy of one's own," [96] when jurisprudence will be explained as some treatment of a given body of law. In general, I believe that the Austinians, the historical jurists, and the constructive jurists of England and America agree that our system of law is self-sufficient, and that it can be studied satisfactorily without reference to other systems. The comparative studies have their devotees, but their work is considered more or less ornamental. Even Sir Frederick Pollock, who has done his share to popularize it, tells us that the real trouble with Austin was not that he neglected other systems of law, but that he did not know enough about English law. Numerous are the opinions, and not surprising, in insular England that a jurisprudence limited to a single legal system is self-sufficient. Still there are occasions when it seems natural to turn to foreign systems and times when the attitude of the lawyer who in default of a local authority cites a "well-reasoned" foreign case becomes chronic and epidemic. The force that drives men to look into foreign systems is not essentially different from that which drives our own lawyers from time to time to look into foreign digests — it is the earliest realization of the limits of the local system for theoretical as well as for practical purposes. Consequently the Comparative School is an after-product of an age of settled, codified law in the country from which it reaches out. This reaching out is apt to be fragmentary, sketchy, based on no general theory of

[95] *Cf.* the opening lecture of his VILLAGE COMMUNITIES.

[96] Oliver Wendell Holmes, Jr., "The Path of the Law," 10 HARV. L. REV. 474. Not only has the study of Roman Law been criticized but to its door has been traced much of the unsound doctrine that has crept into Anglo-American jurisprudence, and this by a teacher of Roman Law. *Cf.* Roscoe Pound in 30 HARV. L. REV. 219 *ff.* (1917). "Thus both the schools of Anglo-American jurists [Analytical and Historical] were Romanized."

inferiority, but only on practical needs. Indeed for practical reasons it is likely to be cloaked in the hypothesis that what is expressed in the foreign system is implied in our own. The other side, the side that resists importation, is the one that generally makes itself heard more clearly in the literature of the law. Fortescue and Saint German in England, like the earliest French comparativists and the Germans of today, write apologetics. The last of these make out of their *vergleichende Rechtswissenschaft* an *Universalrechtsgeschichte*, a kind of history of civilization in which their own condition is shown as the grand climax towards which the universe has been striving all these years, and in which each nationality is given a little recognition for its own little contribution to the final results.[97] Failure to correspond with modern German standards shows a defect in development whether found in Islam or in the Anglo-American system.[98] Fortunately not all apologists go to this extreme. But all this vehemence is not wasted on denying what no one asserts, for in the current if not in the written jurisprudence of such periods, the dogma of the first days of the code is being seriously questioned.

(*f*) *Exegetical Schools*

Your true glossator in practice is concerned with the enforcement of the supposedly perfect code, and his theory seeks only the proper ways of explaining that code. It deals with hermeneutics or exegesis. Strangely enough, the word *Jurisprudenz* in Germany has come to stand for just this sort of activity, while

[97] Thus KOHLER, ENCYKLOPEDIE, 6 ed., 1902, 17–18: Die Universalrechtsgeschichte die man auch vergleichende Rechtswissenschaft zu nennen pflegt. Quoted by POLLOCK, in JOURN. SOC. COMP. LEGIS., N. S., 1903, No. 1, 76. *Cf.* also KOHLER, EVOLUTION OF LAW, translated in Evolution of Law Series, vol. II, 3–9. After commenting on the newness of the science of Comparative Legal History (it was quite old in France), he remarks: "Evolution makes use of men and nations against their will. . . . We are now competent to appreciate the unending benedictions of culture. . . . If one speaks constantly of the barbarism of earlier legal systems, it is not to commend as worthy of imitation, but as an object of the movement of culture." The aim of the study is to "discover what was the elastic force, and what the machinery which lifted humanity from one level of development to another, until culture and even superculture, replaced the rudest forms of existence." *Cf.* also his PHILOSOPHY OF LAW (MODERN LEGAL PHILOSOPHY SERIES, No. 12), 11: "Neo-Hegelianism . . . in close touch with the universal study of law introduced anew into this study [Philosophy of Law] the doctrine of Evolution."

[98] *Cf.* his PHILOSOPHY OF LAW, 196.

Rechtswissenschaft and *Rechtsphilosophie* have been coined for our own denotations of the term. But even their *Rechtswissenschaft* is now primarily the scientific study of the code. Such a book as Karl Gareis on the "Science of Law" (1887, English translation, 1911) could not have been written but in a country contemplating a code. It is not of the Analytical School but of the Exegetical, for it does not analyze *the law*, it only analyzes the "Bürgerliches Gesetzbuch." "It may be admitted," says Dean Pound in his Introduction to Gareis on "Rechtswissenschaft," "that a systematic survey of the materials of jurisprudence might easily fail because of over-abstractness. But recent German texts err, if at all, in the opposite direction. At every point the text is fastened firmly to the German Civil Code." [99] France a hundred years ago produced exactly this kind of work on the "Code Napoléon." [100] The remnants of our own Analytical School may survive to join hands with the Exegetical School that will have to appear as our codifications progress; but consciously or unconsciously they will have to abandon all concepts of "law in general" in doing so. Perhaps we should deny the name "Jurisprudence" to this purely interpretative work. It seems to be the vanishing point of theories of law. But it too has its definition of law. Law is positive law. Legislation is its normal form. Philosophy, history, analysis, comparison, all have their places here, but they are subordinate places. They become the handmaids of Exegesis.

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[99] Kohler has also worked along these lines, frankly in his numerous monographs on particular branches of the law and in his LEHRBUCH DES BÜRGERLICHEN RECHTS NACH DEM BÜRGERLICHEN GESETZBUCHE (1904–06), and not so frankly in his LEHRBUCH DER RECHTSPHILOSOPHIE (1909) where he is constantly pretending to reach the same conclusion as in his work on the German code.

[100] The first annotations of the CODE NAPOLÉON, now long forgotten, are listed in CAMUS, PROFESSION D'AVOCAT, vol. II (5 ed., 1832). One of the most notable works mentioned is TOULLIERS, LE DROIT CIVIL FRANÇAIS, SUIVANT L'ORDRE DU CODE; OUVRAGE DANS LEQUEL ON A TACHÉ DE RÉUNIR LA THÉORIE À LA PRATIQUE, 1811. According to Dupin, the learned editor of CAMUS, this is "*sans contredit, le plus parfait de tous ceux qui, jusqu'à présent ont paru sur le Code Civil.*" The great work of A. DURANTON, COURS DE DROIT FRANÇAIS SUIVANT LE CODE CIVIL, 1828–32 had just appeared. Though echoes of the *droit naturel* were still being heard in France during this period, the hopelessness of a jurisprudence based on it in the face of the code is reflected in L'HERBETTE, DISCOURS SUR LES CAUSES DE LA STAGNATION DE LA SCIENCE DU DROIT EN FRANCE, printed with his INTRODUCTION À L'ÉTUDE PHILOSOPHIQUE DU DROIT, 1819.

The Importance of Popular Jurisprudence

I have drawn my illustrations from the great names among the world's jurists. To a very great extent they represent the best opinions and the most potent opinions current in their times. Here and there a genius — a Bacon, a Leibnitz, a Vico, a Bentham, or a Maine — stands head and shoulders above his surroundings, or an eccentric person — perhaps some of the same names could be repeated as examples — deliberately withdraws from his associates. In one sense the very greatest exponents of each jurisprudence stand somewhat aside from the smaller advocates, the blinder partisans. But our present study is concerned with large movements, general trends. We must remember that the connection between the jurisprudence of an epoch and its practices is not limited to the jurisprudence of the chair, the *professoren-philosophie der philosophie-professoren.* Popular jurisprudence, that of the man who does not know that he has any jurisprudence, is elevated to a position of importance and influence. It is hardly to be expected that the general practitioner will form a lasting alliance with any one school: today he needs a strict construction, tomorrow a loose one may help him; in one case he insists that he cannot find it in the bond, in another he finds it necessary to appeal to a higher law in which justice is tempered with mercy. Only judges and professional law teachers seem able consciously to align themselves with the schools, and it is significant that in America the development of a teaching profession coincides with the awakening of interest in jurisprudence. But the practitioner too is carried along with the trend of the times and helps to control it. I know that there is a great temptation among the learned to despise the juristic theories of the American lawyer brought up on the first chapters of Blackstone, and to sneer at those who seem to be discovering principles that are all but discarded in some more "advanced" country;[101] but unless one's jurisprudence is to progress step by step with his law, jurisprudence will remain *im juristischen Begriffshimmel* and be despised by the practical lawyer. We cannot import a ready-made jurisprudence from

[101] Thus it has been pointed out as a reproach that the American historical school resembled the older German school.

Germany without importing its code, and for that matter its whole *Kultur*.[102] We must make our own jurisprudence out of the raw materials found in our law and in the popular mind. Of course, we can be helped by the experience of others. Thus, so long as we are going through a consciously constructive period our theories will be more like those of Jhering than like those of Kohler. We still have a "struggle for law," and cannot look down from the benign heights of a perfect legal system on the imperfect specimens around us, either to correct their defects or benevolently to assimilate their virtues. When an American jurist argues for "realism in Constitutional Law" he is following in the footsteps of the man who first condemned the jurisprudence of concepts in Germany and ennobled the jurisprudence of everyday life.[103] Our theory must smack of the periods of the making of great codes, rather than of the periods of their use. Thus Glossatorial Germany may honestly argue from the fact that International Law is not written, that it is not law.[104] To Anglo-American jurists, the influence of Austin notwithstanding, it is law because history has made it, or if it is not law it would at least seem reasonable that we should enact it — perhaps through a League of Nations. Public opinion under neither system would be greatly influenced by the Grotian basis of International Law, the Law-of-Nature theory; though French and Italian public opinion probably would. Perhaps it is going too far to search in general history for the remote effects of popular jurisprudence, but when the history of law is completely written we can confidently expect that popular jurisprudence will be given its due place as a concomitant, if not a cause and effect, of other more tangible developments. It is at least no accident that one section of the American Bar is still

[102] *Cf.* Robert Ludlow Fowler, 27 HARV. L. REV. 718, "The New Philosophies of Law," page 720: "Now it is indubitable that the science of the law of Germany is not the science of the law of English-speaking countries." If to Judge Fowler's vertical division of jurisprudences by countries, we add a horizontal division on the basis of stages of development we can almost reconcile the views so pointedly contrasted in 27 HARV. L. REV.

[103] *Cf.* Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353 (1916).

[104] Kohler's discussion of International Law at the end of his PHILOSOPHY OF LAW (1909, Eng. tr. 1914) is a remarkable presentation of the German point of view in the World War, particularly 301, 303, and 306–307. Lasson also denied that International Law had any legal basis. *Cf.* BEROLZHEIMER, 258.

going to school to Maine and Savigny, while another section is endeavoring to lead the way to a *Zweck im Recht.*

The Indirect Teaching of Jurisprudence

The American Bar "going to school" suggests the final thought that this popular jurisprudence is not generally disseminated by conscious teaching. It is caught in the courtroom more from the manner than from the matter, and taken for granted in the classroom in its methodology. There is a palpable connection between our conception of what law is, and our way of handing it down to the next generation. The Inns of Court flourishing while law was a philosophy, a spirit to be inhaled, or swallowed with one's meals, a mystery into which to be initiated, broke down when Blackstone showed that it was a series of principles to be learned. The University class was to take the place of the legal monastery. But was not this change a reversion to type? Coke, it will be remembered, that incarnation of the common law as opposed to equity, lamented the decline of the ancient system of readings, a system under which the Inns of Court had practically been universities of strict law.[105] The revival of readings in the early nineteenth century and the other changes in the system of education, including the establishment of examinations for admission to the bar (1827), represent a veering to the analytical branch of the principle-school, the only branch that had any life remaining in it after the crystallization of Equity under Lord Eldon and his immediate predecessors. The analytical attitude finds its expression in the lecture and text-book methods of teaching law for the next two generations. The law to the great imitators of Blackstone, regardless of how they phrased it in their needless introductions, was a body of principles, perhaps a perfect body of principles. As the consciousness that these principles were not immutable was forced upon the lawyers, however (when it became necessary to explain, for example, that only so much of English Law as was applicable to American conditions had been received in this country),[106] the analytical presentation seemed to be doomed. True, a new method of teaching was not substituted as early as it could have

[105] First Institute, I, 280. *Cf.* Bernard W. Kelley, A Short History of the English Bar, 1908, 51 *ff.*

[106] *E. g.*, Story, J., in Van Ness *v.* Pacard, 2 Pet. 144 (1829).

been logically,[107] but eventually the analytical text-books and lectures passed away [108] before the study of cases which implies all that the Historical School stands for. And today rumblings are being heard against the tacit assumption of our schools that the common law is a growth independent of the courts that enforce it or the governments that sanction it.[109] Our ignoring of the relation of the state to the law and, in fact, of all statute law cannot go on forever. Dean Wigmore's courses in Legislation are an echo of the Constructive School.[110] Will the next generation be pondering over excerpts from the code, and will it spend its time studying out the implications of every word, using history to fill in the gaps with "Encyklopedie" as the frame, and hermeneutics as the general content of the course — as they do in the German law schools today? One can hardly expect such sudden changes in the habits of the most conservatizing of professions. Still the need of a study of statutory interpretation is already foreseen here,[111] and other changes will follow. But *stare decisis* and all that it implies will probably retain a great part of its hold upon us. It seems that in every legal system one of the instrumentalities of development predominates over the others, without however excluding any of them. Is this mere accident, or can the ethnological jurists help us here? Glossation seems to have impressed itself on Jewish law so that its typical text-book is a gloss upon a gloss, with mar-

[107] John Henry Wigmore, "Nova Methodus Discendae Docendaeque Jurisprudentiae," 30 HARV. L. REV. 812 (1917).

[108] Even the "elementary" or "general" courses have had a hard and losing fight. *Cf.* Association of American Law Schools, REPORT, 1902, remarks by Joseph Henry Beale, 45, and the lively discussion, 11–31; REPORT, 1903, 23, Simeon Eben Baldwin, in defense. Prof. Josef Redlich recommended such a course in his report on THE CASE METHOD IN AMERICAN LAW SCHOOLS (1914), to the Carnegie Foundation, but it was generally disapproved in the discussion at the meeting of the Ass'n of Am. Law Schools in 1915, REPORT, 1915, 77 *ff.*

[109] Prof. Albert Martin Kales and Mr. Herbert Pope have been especially insistent on this point. See REPORTS OF THE AMERICAN BAR ASSOCIATION, vol. XXXI, 1012–27, and 1091–1119; REPORTS OF THE ASS'N OF AM. LAW SCHOOLS, 1907, 82; 1915, 109, 112; 4 ILL. L. REV. 11; 21 HARV. L. REV. 92; 24 *ib.* 6.

[110] *Cf.* Ass'n Am. Law Schools, REPORT, 1915, 34–47.

[111] Prof. Ernst Freund has taken the lead in this work: "The Interpretation of Statutes," 65 U. OF PA. L. REV. 207 (1916); A COURSE IN STATUTES, Ass'n of Am. Law Schools, REPORT, 1916, 160–165. Several law schools now offer courses in Statutes. A widespread interest in the subject of interpretation is also reflected in the recent volume of select essays on THE SCIENCE OF LEGAL METHOD (MODERN LEGAL PHILOSOPHY SERIES, No. 9), 1917.

ginal glossations. In Roman-Continental Law, codification reached such perfection that it has obscured the value of judicial precedents. Its typical text-book is the volume of "Institutes." In Anglo-American Law, Commentation seems to have made case-law the predominant element, even while our statutes, codes, and constitutions are fresh and vigorous.

In conclusion: there is a place for each school of jurisprudence in connection with the particular law out of which it grows, just as each grammar is fitted to the language that it describes.[112] There are perhaps permanent and universal elements in grammar and in jurisprudence — if there are any permanent and universal traits in human nature — but it is as unsatisfactory to teach English law with German jurisprudence as to teach the English language with German grammar. Neither should we condemn the jurisprudence of a past age for its failure to meet our present problems, any more than we should condemn the double negative in the grammar of Chaucer's day. At present our problems in this country have to do with a final dash of legislation before codification settles in our bones. The jurisprudence of modern American life has not yet been written, yet enough has been said and done to show that to represent the needs of our day it must deal with law in a manner that will do justice to the social changes and discoveries that lie immediately behind it. But in accepting the program of the sociological jurist of the Constructive School for today, we do not close our eyes to what Dicey would call "cross currents" from past and future systems, that save us from the tyranny of ideas. Granting the predominance of a school today in America, we neither regret its absence in the past nor prophesy its continued endurance here or imitation abroad. May we not accept the doctrine of the relativity of jurisprudences? It is unfortunately true that most of the writers on jurisprudence who pass in review the systems of the past do so only to show that they have been discredited. In Germany the greatest of living jurists while preaching the doctrine of relativity as applied to laws, even to the extent of justifying slavery, is so far from a recognition

[112] *Cf.* HOLLAND, *op. cit.* ch. I. In this connection the value of the Separate Course in Jurisprudence has been discussed. But after a student has learned law by one of these methods referred to in the text, it is not a hopeful task to make of him a jurist of a type inconsistent with the assumptions back of all of the work of his teachers by merely adding a formal course in jurisprudence to what he has already learned.

of the relativity of jurisprudences that he blushes for some of his predecessors, and asks that others be buried and forgotten because they fail to embody his doctrines. At best their appearance is to be tolerated as a "necessary disease" or, as one of his contemporaries would say, for the propagation of more or less useful "illusions." But in this country it is hoped that the protagonists of the new movements well trained in the school of history, and willing — perhaps too willing — to lend an ear to every foreign system, will not demur to the suggestion of relativity, for they must frequently have observed that jurisprudence has a continuing history as well as law. They have learned that "every man is the child of his age" — and jurists are men.

Nathan Isaacs.

CINCINNATI LAW SCHOOL.